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In The

# Supreme Court of the United States

October Term, 1996

ROBERT C. MILLER, CHARLES BOESENBERG, DAVID G. LUDVIGSON, and MIPS COMPUTER SYSTEMS, INC.,

*Petitioners,*

vs.

DIANE PROVENZ and AHIKIM EIZENBERG, On Behalf of Themselves and All Others Similarly Situated,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider the scienter requirement for § 10(b) actions when the lower courts agree on the applicable standard and 1995 amendments to the Securities Exchange Act of 1934, that will control all future cases, are not before the Court?

2. Should this Court grant certiorari to reconsider the Ninth Circuit's holding that the facts in this particular case present a jury question as to defendants' state of mind that cannot be resolved on a summary judgment motion?

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## I. INTRODUCTION

Defendants' Petition asks this Court to review the Ninth Circuit's decision that summary judgment was improper in a securities class action when plaintiffs presented evidence that defendants falsified a publicly-traded company's financial statements, made false projections, and concealed material information about its products – all in order to inflate the price of MIPS Computer Systems, Inc. ("MIPS" or the "Company"), common stock.

The unremarkable holding below is that, because material facts are in dispute, the case cannot be resolved on a summary judgment motion. Defendants nonetheless contend that this case warrants Supreme Court review because lower courts are "in disarray" concerning the scienter requirement for § 10(b) actions, and the Ninth Circuit misapplied the law to the facts of this case. Defendants are wrong on both points.

Specifically, defendants say that the opinion below conflicts with this Court's holding in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that scienter is a necessary element of liability under § 10(b). But *Hochfelder* recognized that recklessness may be deemed a form of intentional conduct, and every court to consider the question has held that recklessness satisfies § 10(b)'s scienter element. Because the lower courts have uniformly adopted the *very standard* of recklessness that the Ninth Circuit applied in this case, defendants' contention that the lower courts are "in disarray" is pure nonsense. And as much as defendants dislike the result below, this Court has better things to do with its time than to reconsider the Ninth

Circuit's holding that *the particular facts and evidence* in this case preclude summary judgment.

The Private Securities Litigation Reform Act ("PSLRA") – which took effect on December 22, 1995 – provides an additional and compelling reason why this case does not merit the Court's attention. Although the PSLRA changed the law governing pleading and proof of scienter in securities cases, because its changes are not retroactive they do not govern this case. Thus, if this Court is to review the scienter requirement for securities actions, it should do so in a case that is governed by the PSLRA.

## II. STATEMENT OF THE CASE

Defendants' Statement of the Case is incomplete and misleading in several important respects. Defendants' repeated assertion that this case involves a mere "difference of opinion," about how to account for transactions subject to no specific accounting rules, is insupportable. So is their contention that the Ninth Circuit applied a negligence standard rather than focusing on defendants' subjective bad faith. In truth, the Ninth Circuit carefully reviewed the summary judgment record and found that plaintiffs presented evidence from which a jury could conclude that certain defendants committed fraud.

The case involves a broader pattern of misconduct than the Petition suggests. Plaintiffs presented evidence that, in addition to falsifying MIPS' financial statements, defendants also issued public projections of revenue with no reasonable basis or belief in their accuracy, and that they made misleading statements about MIPS' products.

Concealing the fact that an important line of products did not work as represented, *see* ER 172/112:CD002052, 172/151, 156, and was not selling well, ER 171/161, 165, defendants made misleading statements about the products' performance and customer demand. ER 172/134:15, 27. Defendants' *knowledge* of the facts that made their statements misleading was *critical* to the Ninth Circuit, which held " '[t]here is a difference between knowing that any product-in-development may run into a few snags, and *knowing that a particular product has already developed problems so significant as to require months of delay.*' " A23 (quoting *In re Convergent Technologies Sec. Litig.*, 948 F.2d 507, 515 n.2 (9th Cir. 1991)) (emphasis added).

"Here," the Court of Appeals observed, "plaintiffs have provided evidence suggesting the R6000 line was experiencing" serious problems that the defendants had concealed. A24. It "was plagued with delays and performance problems so severe that MIPS was losing orders and constantly cutting sales forecasts." A24. "Defendants, however, continued to represent to analysts that there was 'pretty significant demand' and that shipment levels would increase in the third quarter of 1991." A24. In light of what defendants *knew*, a jury could conclude these statements were fraudulent. A24.

Plaintiffs presented evidence that defendants also made public projections of revenues *which they knew were false*. An internal spread sheet dated April 17, 1991, "showed that MIPS' internal forecasts projected a loss of $4,000,000 for the second quarter" of fiscal 1991. A20. Testimony of MIPS' employees showed that defendants knew this internal "forecast represented 'the best, most accurate representation as of the time it was prepared of

what the company's financial results [would] be like for the prospective quarter.' " A21-A22. Nonetheless, in a conference call with securities analysts, just eight days later, MIPS' Chief Financial Officer, defendant David G. Ludvigson, falsely "predicted a profit when in fact MIPS had information that the company would suffer a loss." A21. Given defendants' knowledge, evidenced by the spread sheet, a trier of fact could reasonably conclude that defendants' projections of a profitable second quarter were false or misleading when made, A21-A22, and that Ludvigson in particular knew it. A30-A31.

As to the accounting allegations, too, the case involves more than a mere "difference of opinion." Plaintiffs presented evidence from which a jury could conclude that defendants *knew* they were recognizing revenue long before it was actually earned, in repeated violation of the undisputed general rule that *revenue may not be recognized before it is earned* – a fundamental principle of accounting known to defendants. Although defendants tell this Court that no accounting literature "expressly" or "explicitly" addressed revenue recognition under "technology licensing agreements," *e.g.*, Petition at 4, their assertions miss the point, as the Ninth Circuit explained:

> Although defendants maintain that during the class period at issue no specific GAAP rules existed governing revenue recognition for technology licensing agreements, defendants do not appear to dispute plaintiffs' contentions that, under GAAP, revenue must be *earned* before it can be recognized. Defendants concede that,

> under GAAP, the earnings process must be substantially completed and an exchange must have occurred before revenue can be recognized.

A11 (emphasis in original).

The evidence did not suggest innocent misapplication of accounting rules. Defendants represented to investors, in MIPS' Securities and Exchange Commission ("SEC") filings, that " 'technology revenue is recognized *upon the completion of contract requirements.*' " A37 (emphasis added). Yet, as the Ninth Circuit concluded, "looking at the evidence in the light most favorable to plaintiffs, it appears that . . . defendants recognized revenue before binding agreements existed and before contract requirements were completed." A12. Evidence showed that "until MIPS' customers received the actual technology, *MIPS customers had received nothing they could use,*" that payment was contingent upon receipt of the deliverables, and that to complete its contract requirements and earn its fees MIPS had to ship "deliverables" to its customers. A11. But MIPS recognized revenues before they were earned, when the customers' obligation to pay was at most contingent. *See* A13-A18.

Nor did defendants present evidence that could demonstrate, as a matter of law, that MIPS believed otherwise. Defendants tell this Court that they relied on their accountant but, as the Ninth Circuit explained, "there is evidence suggesting defendants failed to disclose material information to their accountant." A29. One cannot withhold material facts from an accountant, and then claim to rely in good faith on the misinformed accountant's opinion. A29. Defendants also say that most of the

revenue they recognized was earned, and paid, eventually. But that is no excuse for recognizing the revenue before it was earned in order to inflate interim financial results.

The Ninth Circuit carefully reviewed the evidence, distinguishing between accounting violations that likely were knowing and those that were not, and between those defendants who may have acted in bad faith and those who did not. Rather than finding that a "difference of opinion" necessarily precludes summary judgment, the Ninth Circuit affirmed summary judgment on some points, A17-A18, while reversing on others where the crucial facts were in dispute. A30. In sum, the opinion below is a garden-variety application of Federal Rule of Civil Procedure 56.

## III. REASONS FOR DENYING THE WRIT

### A. The Ninth Circuit's Unremarkable Conclusion That Recklessness Can Satisfy § 10(b)'s Scienter Requirement Is No Basis For Review

Defendants contend that certiorari is warranted because the opinion below conflicts with this Court's holding in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), that scienter is an element of § 10(b) liability, and because the lower courts are "in complete disarray" as to the governing standard. In fact, there is no conflict.

*Hochfelder* recognized that "[i]n certain areas of the law recklessness is considered to be a form of intentional conduct." *Id.* at 193 n.12. This Court said that § 10(b) proscribes "knowing or intentional misconduct," *id.* at

193 n.12, 197, but cautioned that recklessness might be considered "a form of intentional conduct." *Id.* at 193 n.12. Every circuit to consider the issue has concluded that reckless conduct does suffice to establish scienter under *Hochfelder*.[1]

Defendants argue that the courts of appeals are all wrong because *Hochfelder* speaks at times of "knowing or intentional misconduct." But a statement made with reckless disregard for its truth *is a knowing falsehood*.[2] In *Cooper v. Schlesinger*, 111 U.S. 148, 155 (1884), this Court held that "the jury were properly instructed that *a statement recklessly made*, without knowledge of its truth, *was a false statement knowingly made*."[3] "Fraud," wrote Cardozo,

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[1] *See, e.g., Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 46 (2d Cir. 1978); *McLean v. Alexander*, 599 F.2d 1190, 1197 (3d Cir. 1979); *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 960-61 (5th Cir. 1981) (en banc); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1024 (6th Cir. 1979); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1044 (7th Cir. 1977); *Stokes v. Lokken*, 644 F.2d 779, 783 (8th Cir. 1981); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc); *Hackbart v. Holmes*, 675 F.2d 1114, 1117-18 (10th Cir. 1982); *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1010 (11th Cir. 1985); *SEC v. Steadman*, 967 F.2d 636, 641-42 (D.C. Cir. 1992).

[2] *See Lehigh Zinc & Iron Co. v. Bamford*, 150 U.S. 665 (1893); *Rolf*, 570 F.2d at 45; *Otis & Co. v. Grimes*, 97 Colo. 219, 222, 48 P.2d 788, 789 (1935); *Kriner v. Dinger*, 297 Pa. 576, 582, 147 A. 830, 832 (1929).

[3] *Id.* (emphasis added). The leading hornbook on the law of fraud before the enactment of the federal securities statutes explained: "[I]f a man makes a positive representation of fact, believing it to be true, without having any information or any adequate information upon which to base it . . . *he then acts, to his own knowledge, falsely* . . . . " Melville M. Bigelow, *The Law of*

"includes the pretense of knowledge when knowledge there is none." *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931).

Defendants nonetheless contend that the lower courts are "in complete disarray" on the scienter standard for § 10(b) actions, because the Ninth Circuit has supposedly embraced an "objective recklessness" standard that amounts to nothing more than negligence – while other circuits reject a negligence standard and require "subjective recklessness." In fact, the Ninth Circuit convened en banc in *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-70 (9th Cir. 1990) (en banc), to make clear that negligence *cannot* suffice, and to adopt the same demanding standard for proof of recklessness that the other circuits have agreed upon. *Id.* *Hollinger* says nothing about rejecting "subjective" recklessness in favor of "objective" recklessness, and defendants themselves never raised their argument about "objective" and "subjective"

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*Fraud* § 3, at 62-63 (1877) (emphasis added). Today's leading hornbook on the law of torts restates the principle:

> There is of course no difficulty in finding the required *intent to mislead* where it appears that the speaker believes his statement to be false. Likewise, there is general agreement that *it is present when the representation is made without any belief as to its truth, or with reckless disregard whether it be true or false.*

W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on the Law of Torts* § 107, at 741-42 (5th ed. 1984) (emphasis added, footnotes omitted).

recklessness in the courts below. That alone suggests the "issue" is not properly before this Court.[4]

Nonetheless, defendants argue that the Seventh Circuit held in *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. 1977), that "subjective recklessness" is necessary for § 10(b) liability, while the Ninth Circuit rejected *Sundstrand*'s subjective standard and "adopted an objective test in *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc)." Petition at 23. This is a very strange assertion. *Hollinger* expressly adopted the Seventh Circuit's *Sundstrand* standard as Ninth Circuit law, overruling all prior Ninth Circuit decisions that had construed "recklessness" in a way that it might overlap with negligence. 914 F.2d at 1568-69. Recklessness is defined in the Ninth Circuit, as in the Seventh under *Sundstrand*, as conduct that

> "involv[es] not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either *known to the defendant or is so obvious that the actor must have been aware of it.*"

*Hollinger*, 914 F.2d at 1569 (quoting *Sundstrand*, 553 F.2d at 1045) (emphasis added). This "subjective" standard from *Hollinger* and *Sundstrand* is, in fact, the very standard applied by the Ninth Circuit in this case. *See* A26-A27 (quoting *Hollinger*, 914 F.2d at 1568-69 (quoting *Sundstrand*, 553 F.2d at 1045)).

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[4] *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

That should not be surprising, for *Sundstrand*'s formulation has become a uniform national standard, explicitly adopted and applied by the First,[5] Second,[6] Third,[7] Fifth,[8] Sixth,[9] Seventh,[10] Eighth,[11] Ninth,[12] Tenth,[13] Eleventh,[14] and District of Columbia[15] Circuits – as well as by district courts in the Fourth Circuit.[16] No court of appeals has rejected the *Sundstrand* standard.

Defendants say that the decision below nonetheless departed from precedent when it held that a mere "difference of opinion" is sufficient to establish liability. The Ninth Circuit did nothing of the sort. It held that a jury could find this case *does not* involve an *honest* difference

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[5] *Hoffman v. Estabrook*, 587 F.2d 509, 516-17 (1st Cir. 1978); *Cook v. Avien, Inc.*, 573 F.2d 685, 692 (1st Cir. 1978).

[6] *Rolf*, 570 F.2d at 47.

[7] *Sharp v. Coopers & Lybrand*, 649 F.2d 175, 193 (3d Cir. 1981); *McLean*, 599 F.2d at 1197-98.

[8] *Broad*, 642 F.2d at 960-61; *Rubinstein v. Collins*, 20 F.3d 160, 169 (5th Cir. 1994).

[9] *Ohio Drill & Tool Co. v. Johnson*, 625 F.2d 738, 741 (6th Cir. 1980).

[10] *Sundstrand*, 553 F.2d at 1044-45.

[11] *K&S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 978 (8th Cir. 1991).

[12] *Hollinger*, 914 F.2d at 1569-70.

[13] *Hackbart*, 675 F.2d at 1118.

[14] *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982).

[15] *SEC v. Steadman*, 967 F.2d at 641-42.

[16] *PPM America, Inc. v. Marriott Corp.*, 875 F. Supp. 289, 301-02 (D. Md. 1995); *Frankel v. Wyllie & Thornhill, Inc.*, 537 F. Supp. 730, 740 (W.D. Va. 1982).

of opinion about applicable accounting rules. According to the Ninth Circuit, "a plaintiff must 'explain[ ] why the difference . . . is *not* merely the difference between two permissible judgments." A28 (emphasis added) (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1549 (9th Cir. 1994) (en banc)). The Ninth Circuit held that plaintiffs failed to do this as to certain alleged accounting violations – and affirmed summary judgment for defendants on those claims. A17-A18. The Court also emphasized that " ' "the mere publication of inaccurate accounting figures, or a failure to follow GAAP, without more, does not establish scienter." ' " A28 (quoting *In re Software Toolworks Sec. Litig.*, 38 F.3d 1078, 1089 (9th Cir. 1994) (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1426 (9th Cir. 1994))). It warned that " '[a]n expert's conclusory allegations that a defendant acted with scienter are insufficient to defeat summary judgment where the record clearly rebuts any inference of bad faith.' " A29 (quoting *Worlds of Wonder*, 35 F.3d at 1426).

The Ninth Circuit then held that the facts *in this case* support a finding of bad faith as to MIPS' pattern of improper revenue recognition. Although MIPS represented in its SEC filings that " 'technology revenue is recognized upon the completion of contract requirements,' " A37, plaintiffs presented documentary evidence to show that the Company knowingly recognized revenue before it was earned, in violation of its own policies. Plaintiffs *supplemented* this evidence with expert testimony: "Not only have plaintiffs provided documentary evidence that suggests that defendants may have recognized revenue before it was earned, they also provided expert testimony in support of their contentions." A28.

Indeed, "plaintiffs' two experts have explained in great detail how defendants' recognition of revenue for various transactions violated GAAP *and MIPS' own internal policy* for recognizing revenue." A28 (emphasis added).

The Ninth Circuit also focused on defendants' subjective state of mind when it considered "defendants' stock sales during the class period *as evidence of defendants' bad faith.*" A29 (emphasis added). It held that " 'credible and wholly innocent explanations for stock sales, ranging from long-standing programs of periodic divestment, to the need to free cash to meet matured tax liabilities, [if] . . . unrebutted . . . are sufficient to defeat any inference of bad faith,' " A29 (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1117 (9th Cir. 1989)), and affirmed summary judgment for two defendants because it believed an inference of bad faith was unwarranted. A30, A38. There is nothing ambiguous about the Ninth Circuit's focus on defendants' *subjective* and *deliberate* intent. Any distinction between "objective" and "subjective" recklessness is inconsequential at the summary judgment stage, in any event. If the evidence shows that defendants were "objectively" reckless, how can they argue that a jury may not determine that they were in fact "subjectively" reckless? Because those who misstate or conceal the truth seldom candidly admit that they did so with scienter, direct evidence of intent to defraud or recklessness seldom exists, and proof of state of mind almost always requires resort to objective or circumstantial evidence.[17] The fact that "the proof of scienter

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[17] *See In re Phillips Petroleum Sec. Litig.*, 881 F.2d 1236, 1241 (3d Cir. 1989); *United States v. Cohen*, 516 F.2d 1358, 1367 (8th Cir.

required in fraud cases is often a matter of inference from circumstantial evidence," *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983), cannot be transformed into some "conflict" between "objective," facts that show recklessness, and the "subjective recklessness" that they prove.

In short, there is no conflict among the circuits, no reason to think the circuit courts are wrong, and no reason for this Court to review this case.

### B. Defendants' Objection To The Ninth Circuit's Application Of A Settled Scienter Standard To The Particular Facts Of This Case Is No Ground For Review

Much of the Petition is devoted to arguing that the Ninth Circuit's holding is wrong *on the facts of this case*. This Court has better things to do with its time than to reconsider the Ninth Circuit's holding that *the particular facts* in this case are sufficient to go to a jury. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Defendants' contentions that the Ninth Circuit erred are based on misconceptions about the record, and mischaracterizations of the Ninth Circuit's analysis, in any event.

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1975); *United States v. Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969); *Benchwick v. United States*, 297 F.2d 330, 333 n.5 (9th Cir. 1961).

Defendants quibble with the Ninth Circuit's holding that insider trading of certain defendants was evidence of scienter. But the Court carefully distinguished between patterns of insider stock sales that suggested bad faith, and those that did not. A29-A30. It even *affirmed* summary judgment for defendants who had "sold their stock for innocent reasons." A30. When defendants say that they were subject to no specific rule that expressly referred to "technology licensing agreements," they ignore the *general* rule that revenue may not be recognized before it is earned – as the Ninth Circuit aptly noted. A11. Defendants disparage plaintiffs' expert testimony as expressing a mere "difference of opinion," but the Ninth Circuit held that an honest difference of opinion on MIPS' restructuring reserve was *not* enough to raise a jury question. A17-A18. It required evidence of *scienter* for plaintiffs' case in revenue recognition to go to a jury. Surely, no one doubts that circumstantial evidence and expert testimony can be relevant to show scienter. *See Huddleston*, 459 U.S. at 390 n.3; *Fine v. American Solar King Corp.*, 919 F.2d 290, 297 (5th Cir. 1990).

Defendants say that most of the revenue they recognized was earned and collected *eventually* – but that is no excuse for inflating interim financial statements by recognizing revenue long *before* it was earned. Defendants say that they relied on MIPS' accountants, but the Ninth Circuit noted "evidence suggesting defendants failed to disclose material information to their accountant." A29. Defendants cannot conceal the facts from their accountant, then purport to rely in good faith on the accountant's opinion. A29.

In the end, the very fact that defendants ask this Court to resolve factual disputes about their state of mind shows that this is *not* an appropriate case for Supreme Court review.

### C. Any Review Of § 10(b) Scienter Standards Should Be Reserved For A Case Governed By Current Law

Even if defendants could identify a substantial question, or conflict in the lower courts – and they cannot – this case would be a poor candidate for review because it is subject to the law in place before December 22, 1995, when the Private Securities Litigation Reform Act ("PSLRA") changed the standards of liability for many securities cases. Any review of § 10(b) scienter standards by this Court should take place in the context of a case subject to *current law* that will provide a reliable precedent for the future.

The PSLRA effected several amendments that relate to scienter in Securities Exchange Act of 1934 ("Exchange Act") cases. It enacted a new § 21E that expressly raises the scienter standard for certain forward-looking statements from recklessness to "actual knowledge." 15 U.S.C. § 78u-5(c)(1)(B). A new § 21D(g) makes joint-and-several liability turn upon a showing of "actual knowledge" of falsity, leaving reckless violators subject only to proportionate liability. 15 U.S.C. § 78u-4(g). A new § 21D(b)(2) requires plaintiffs to raise a "strong inference" of scienter even at the pleading stage. 15 U.S.C. § 78u-4(b)(2). Citing legislative history, several recent decisions hold that this provision raised the *standard of liability* for all

§ 10(b) claims.[18] That conclusion is open to dispute.[19] But the amended securities laws unquestionably do not apply in this case: Congress provided that changes to the law governing § 10(b) scienter requirements "shall not affect or apply to any private action," such as this case, "commenced before and pending on" December 22, 1995. Pub. Law No. 104-67, § 108, 109 Stat. 737, 758 (1995).

Thus, if this Court is to address the scienter requirements for § 10(b) actions, it should do so in a case governed by current law, rather than in a "left-over" case from the prior statutory scheme.

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[18] *See In re Silicon Graphics Sec. Litig.*, 1996 U.S. Dist. LEXIS 16989, at *19-*20, [1996-1997 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶99,325, at 95,961-63 (N.D. Cal. Sept. 26, 1996); *see also Norwood Venture Corp. v. Converse Inc.*, 96 Civ. 3713(HB), 1997 U.S. Dist. LEXIS 4292, at *7-*8 (S.D.N.Y. April 9, 1997); *Friedberg v. Discreet Logic, Inc.*, No. 96-11232-EFH, 1997 U.S. Dist. LEXIS 2893, at *19-*27 (D. Mass. March 7, 1997).

[19] *See Rehm v. Eagle Finance Corp.*, 954 F. Supp. 1246, 1252-53 (N.D. Ill. 1997); *Marksman Partners, L.P. v. Chantal Pharmaceutical Corp.*, 927 F. Supp. 1297, 1309-10 & n.9 (C.D. Cal. 1996).

## IV. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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